Supreme Court, U.S.
FILED
DEC 21 1995
CLERK

No. 95-919

# IN THE SUPREME COURT OF THE UNITED STATES OCTOBER TERM, 1995

UNITED STATES ex rel. PAUL,
*Petitioner*,

v.

PARSONS, BRINCKERHOFF, QUADE & DOUGLAS, INC., *et al.*,
*Respondents*.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

## BRIEF IN OPPOSITION FOR RESPONDENT BATTELLE MEMORIAL INSTITUTE, PROJECT MANAGEMENT DIVISION

Frederick Robinson*
Brent J. Fields
FULBRIGHT & JAWORSKI L.L.P.
801 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
(202) 662-0200
*Counsel for Respondent Battelle Memorial Institute, Project Management Division*
**Counsel of Record*

39 pp

## QUESTIONS PRESENTED

I. Whether the jurisdictional provisions of the False Claims Act ("FCA"), 31 U.S.C. § 3730(b) (1994), which provide that an action under the FCA "may be brought in any judicial district . . ." (emphasis added), divest state courts of jurisdiction to hear cases brought under the FCA.

II. If not, whether the district court clearly erred in its finding that Petitioner's FCA action was barred by the doctrine of res judicata, as governed by Texas law, where: (1) Petitioner had already fully litigated his employment dismissal in a prior state-court action in Texas; (2) the prior state-court action was a final judgment on the merits by a court of competent jurisdiction; (3) Respondent, Battelle Memorial Institute, Project Management Division ("BMI"), was, for purposes of res judicata, in privity with the defendant in the prior state-court action; (4) the prior state-court action and the FCA suit arose from the same operative facts; and (5) the FCA claims could have been brought with the prior state-court action.

## TABLE OF CONTENTS


Page(s)

JURISDICTION ..... 1

PROCEDURAL HISTORY ..... 2

A. District Court Proceedings ..... 2

B. Court Of Appeals Proceedings .... 4

BACKGROUND FACTS ..... 6

A. Contract History ..... 6

B. Litigation History ..... 7

SUMMARY OF ARGUMENT ..... 9

ARGUMENT ..... 10

I. The Lower Courts Correctly Found That This Action Is Barred By Paul's Failure To Bring His False Claims Act Action With The Prior State-Court Action ..... 10

A. State And Federal Courts Have Concurrent Jurisdiction Over False Claims Act Suits ..... 10

B. The Lower Courts' Claim Preclusion Analyses

Properly Relied Upon The Law Of The State Of Texas ..... 15

C. The Lower Courts Properly Found That Paul's Instant False Claims Act Suit Constitutes the Same Cause of Action As His Prior State-Court Claim ..... 16

D. The Lower Courts Properly Found That The Present Parties Were Either Parties Or In Privity To Parties To The Prior State-Court Action ..... 19

1. BMI Is A Privy With PB-KBB With Regard To The Prior State-Court Action ..... 19

2. The Preclusive Nature Of The Prior State-Court Action Binds Paul Because He Was A Party To That Action ..... 21

E. The Fifth Circuit Properly Declined To Address Paul's Attacks On The Validity Of

The Prior State-Court Judgment And, In Any Event, Paul's Attacks Are Meritless ..... 22

1. Jurisdiction For Paul's State-Court Action Was Properly Vested In The Texas State Court ..... 23

2. The State-Court Judgment Cannot Be Collaterally Attacked On The Basis Of Alleged Fraud ..... 25

II. Paul's Attacks On The Magistrate Judge's Ruling Raise No Matters Warranting The Grant Of Certiorari ..... 27

CONCLUSION ..... 28

## TABLE OF AUTHORITIES


CASES — Page(s)

Abbott Labs. v. Gravis,
470 S.W.2d 639 (Tex. 1971) . . . . . 16

Allen v. McCurry, 449 U.S. 90 (1980) . . . . . 15

Ayala v. United States,
980 F.2d 1342 (10th Cir. 1992) . . . . . 28

Barr v. Resolution Trust Corp.,
837 S.W.2d 627 (Tex. 1992) . . . . . 17, 18

Bonniwell v. Beech Aircraft Corp.,
663 S.W.2d 816 (Tex. 1984) . . . . . 16

Brown v. Wesley's Quaker Maid, Inc.,
771 F.2d 952 (6th Cir. 1985) cert. denied,
479 U.S. 830 (1986) . . . . . 27

Charles Dowd Box Co. v. Courtney,
368 U.S. 502 (1962) . . . . . 11

Dobbs v. Navarro, 506 S.W.2d 671
(Tex. App. -- Houston [1st Dist.]
1974, no writ) . . . . . 17

Estate of Menna v. Saint Agnes Medical Ctr.,
1994 U.S. Dist. LEXIS 13693 (E.D. Pa.
Sept. 22, 1994) . . . . . 22

Fidelity Standard Life Ins. Co. v. First Nat'l Bank & Trust Co., 382 F. Supp. 956 (S.D. Ga. 1974), aff'd, 510 F.2d 272 (5th Cir.), cert. denied, 423 U.S. 864 (1975) . . . . . 26

Flores v. Edinburg Consol. Indep. Sch. Dist., 741 F.2d 773 (5th Cir. 1984) . . . . . 17

Freytag v. Commissioner of Internal Revenue, 111 S. Ct. 2631 (1991) . . . . . 23

Gilbert v. Franklin County Water Dist., 520 S.W.2d 503 (Tex. Civ. App. -- Texarkana 1975, no writ) . . . . . 26-27

Good v. Allain, 823 F.2d 64 (5th Cir. 1987) . . . . . 28

Gulf Offshore Co. v. Mobil Oil Corp., 453 U.S. 473 (1981) . . . . . 11, 12-13, 15

Hogue v. Royse City, 939 F.2d 1249 (5th Cir. 1991) . . . . . 15, 17

In re Grand Jury Proceedings, 517 F.2d 666 (5th Cir. 1975) . . . . . 23

Jones v. United States, 362 U.S. 257 (1960) . . . . . 23

Langston v. Insurance Co. of N. America, 827 F.2d 1044 (5th Cir. 1987) . . . . . 16, 18

Lawn v. United States,
355 U.S. 339 (1958) . . . . . 23

Lemon v. Spann, 633 S.W.2d 568 (Tex. App. --
Texarkana 1982, writ ref'd n.r.e.) . . . . . 20

Paul v. Federal Mine Safety and Health Review
Comm'n, 812 F.2d 717 (D.C. Cir.), cert.
denied, 483 U.S. 1023 (1987) . . . . . 8

Paul v. P.B.-K.B.B., Inc.,
3 MSHC 2006 (1985) . . . . . 8

Paul v. P.B.-K.B.B., Inc., 801 S.W.2d 229
(Tex. App. -- Houston [14th Dist.] 1990,
writ denied) . . . . . 3, 8, 9, 18, 23, 26

Pirtle v. Gregory, 629 S.W.2d
919 (Tex. 1982) . . . . . 24

Public Interest Bounty Hunters v. Board of
Governors of Fed. Reserve Sys.,
548 F. Supp. 157 (N.D. Ga. 1982) . . . . 21-22

Raney v. Mack, 504 S.W.2d 527 (Tex. Civ. App. --
Texarkana 1973, no writ) . . . . . 26

Robbins on behalf of United States v. Desnick,
1991 U.S. Dist. LEXIS 418 (N.D. Ill.
Jan. 10, 1991) . . . . . 13, 22

Schutten v. Shell Oil Co.,
421 F.2d 869 (5th Cir. 1970) . . . . . 25

Soto v. Phillips, 836 S.W.2d 266 (Tex. App. -- San Antonio 1992, writ denied) . . . . . 20

Tafflin v. Levitt, 493 U.S. 455 (1990) . . . . . 11, 12-13

United States ex rel. Hartigan v. Palumbo Bros., Inc., 797 F. Supp. 624 (N.D. Ill. 1992) . . . . . 11, 12, 13

United States ex rel. Hindo v. University of Health Sciences/The Chicago Medical Sch., 1993 U.S. Dist. LEXIS 17306 (N.D. Ill. Dec. 7, 1993) . . . . . 13, 22

United States ex rel. Paul v. Parsons, Brinkerhoff, Quade & Douglas, Inc., 860 F. Supp. 370 (S.D. Tex. 1994), aff'd without op. 53 F.3d 1282 (5th Cir. 1995) . . . . . 1, 3, 4

United States ex rel. Paul v. Parsons, Brinkerhoff, Quade & Douglas, Inc., 53 F.3d 1282 (5th Cir. 1995) (unpublished opinion) . . . . . 5, 22-23

United States Fire Ins. Co. v. Millard, 847 S.W.2d 668 (Tex. App. -- Houston [1st Dist.] 1993, n.w.h.) . . . . . 19

Vandervoort, Sams, Anderson, Alper & Post, P.A. v. Vandervoort, 529 F.2d 424 (5th Cir. 1976) . . . . . 25

Vondy v. Commissioners Court of Uvalde County, 620 S.W.2d 104 (Tex. 1981) . . . . . 25

STATUTES & CONSTITUTION

28 U.S.C. § 636 (1988) . . . . . 27

28 U.S.C. § 1254 (1988) . . . . . 1

28 U.S.C. § 1738 (1988) . . . . . 15

30 U.S.C. § 801 et seq. (1994) . . . . . 7

31 U.S.C. § 3730(b)(4) (1982), amended by 31 U.S.C. § 3730(e)(4) (1994) . . . . . 1

31 U.S.C. § 3730(b) (1994) . . . . . 3

31 U.S.C. § 3730(e)(4) (1994) . . . . . 1

31 U.S.C. § 3730(h) (1994) . . . . . 18

31 U.S.C. § 3732 (1994) . . . . . 11

Tex. Gov't Code Ann. § 24.007 (Vernon 1988) . . . . . 23

U.S. Const. art. IV, § 1 . . . . . 15

RULES

Fed. R. Civ. P. 12(b)(6) . . . . . 28

Fed. R. Civ. P. 19 . . . . . 24

Fed. R. Civ. P. 56 . . . . . 28

Sup. Ct. R. 13.1 . . . . . 1

Sup. Ct. R. 14.1(b) . . . . . 2

Sup. Ct. R. 29.1 . . . . . 2

Tex. R. Civ. P. r. 39 . . . . . 24

TEXTBOOKS & OTHER

21 Federal Procedure, L. Ed. § 51:188 (1984) . . . . 25

False Claims Amendments Act of 1986,
Pub. L. No. 99-562, 1986 U.S.C.C.A.N.
(99 Stat.) 5266 . . . . . 13-14

1B Moore's Federal Practice ¶ 412 (1995) . . . . . 19

Restatement (Second) of Judgments § 12 . . . . 23-24

Restatement (Second) of Judgments § 24(2) . . . . . 18

Restatement (Second) of Judgments § 51(1) . . . . . 20

## JURISDICTION

A final decision was issued by the United States District Court for the Southern District of Texas on August 1, 1994, and that decision was affirmed by the United States Court of Appeals for the Fifth Circuit on April 28, 1995. United States ex rel. Paul v. Parsons, Brinkerhoff, Quade & Douglas, Inc., 860 F. Supp. 370 (S.D. Tex. 1994), aff'd without op. 53 F.3d 1282 (5th Cir. 1995). Petitioner filed a petition for rehearing which was denied by the Fifth Circuit on July 10, 1995. Petitioner then filed the instant Petition for Writ of Certiorari ("Pet.") within ninety days of that denial. Accordingly, the petition was filed timely under Rule 13.1 of the Supreme Court Rules. See 28 U.S.C. § 1254 (1988).

Although this Court has jurisdiction to review this case under Rule 13.1 and 28 U.S.C. § 1254, BMI continues to assert -- as it did before the district court and the Fifth Circuit -- that the federal courts lack subject matter jurisdiction over this case. Briefly, under the FCA, the federal courts lack jurisdiction over any cause of action arising prior to 1986 if the "action is based on evidence or information the Government had when the action was brought." 31 U.S.C. § 3730(b)(4) (1982), amended by 31 U.S.C. § 3730(e)(4) (1994). For claims arising after 1986, the courts have no jurisdiction over actions based upon publicly disclosed allegations or transactions unless the relator is the "original source" of that information. 31 U.S.C. § 3730(e)(4) (1994). As BMI asserted before the lower courts, Petitioner's FCA suit contains no information that the Government did not have when the action was

brought, all of Petitioner's allegations had been publicly disclosed when the action was brought and Petitioner is not an "original source." Consequently, there is no federal court subject matter jurisdiction over this action.

## PROCEDURAL HISTORY

### A. District Court Proceedings

Respondent BMI is a non-profit charitable trust organized as a non-profit corporation under the laws of the State of Ohio.[1/] Its primary activity is the performance of research, development, management, and technical services on a contract basis for industrial, federal, state, and local governmental clients. Petitioner Paul is an engineer who, in 1982, worked for Respondent PB-KBB, one of two companies constituting a joint venture that was a subcontractor to BMI. The joint venturers were Respondents PBQD, a New York corporation, and PB-KBB, a Delaware corporation.

---

1/ In addition to BMI, a listing of the parties in the lower court proceedings, as required by Rule 14.1(b) of the Supreme Court Rules, includes: (1) Petitioner Dilip Kumar Paul ("Paul"); (2) Respondent P.B.-K.B.B., Inc. ("PB-KBB"); and (3) Respondent Parsons, Brinckerhoff, Quade & Douglas, Inc. ("PBQD"). Pursuant to Rule 29.1 of the Supreme Court Rules, BMI states that it has no parent companies, however, it has two non-wholly owned subsidiaries: (1) Geosafe Corporation; and (2) Research Insurance Company Limited. Both of these subsidiaries are approximately 99% owned by BMI.

On August 10, 1992, Paul filed a complaint in the United States District Court for the Southern District of Texas under the qui tam provisions of the FCA, 31 U.S.C. § 3730(b) (1994), against PB-KBB and PBQD. On September 11, 1992, Paul filed a qui tam complaint against BMI containing virtually identical allegations. On April 1, 1993, pursuant to 31 U.S.C. § 3730(b)(4)(B), the United States filed a Notice of Election Not to Intervene in this action. On July 14, 1993, the district court ordered the consolidation of Paul's complaint against PBQD and PB-KBB with the action against BMI.

On November 19, 1993, BMI filed a motion to dismiss Paul's suit, arguing that Paul's action should be dismissed because: (1) the suit was barred by res judicata; (2) there was no federal court subject matter jurisdiction; (3) Paul failed to state a cause of action upon which relief could be granted; and (4) most of Paul's action was barred by the statute of limitations.

The district court granted BMI's motion, finding that "because Paul could have raised the [FCA] allegations contained in the complaint when he filed [a] prior state court action, the principle of res judicata supports dismissal of his complaint . . . ." Paul, 860 F. Supp. at 372. Specifically, in the prior state-court action, discussed more fully below, Paul brought suit against PB-KBB in a Texas state court, claiming that PB-KBB improperly terminated his employment "because he refused to commit an illegal act." Paul v. P.B.-K.B.B., Inc., 801 S.W.2d 229, 229 (Tex. App. -- Houston [14th Dist.] 1990, writ denied). Pursuant to a jury trial, a verdict was returned in favor of PB-KBB,

which was subsequently affirmed. Id. at 230. Based upon that prior state-court ruling, the district court concluded that:

> [i]n this case, the complaint arose from the same operative facts that gave rise to the prior lawsuit. The claims in Paul's complaint could have been adjudicated with the prior lawsuit, forming a convenient trial unit. [] Paul alleged in the prior lawsuit that PB-KBB was engaged in illegal activities and his failure to participate in these activities led to his discharge. Paul alleges that PBQ&D and BMI participated with PB-KBB in the illegal acts. Although the complaint asserts a new theory and measure of recovery, the alleged filing of false or fraudulent claims, the operative facts are the same as those in the prior lawsuit.

Paul, 860 F. Supp. at 374. PB-KBB was dismissed on the basis of res judicata, and BMI and PBQD, as privies to PB-KBB for the purpose of the prior state-court action, were similarly dismissed. Id. at 373.

### B. Court Of Appeals Proceedings

On August 30, 1994, Paul filed a notice of appeal to the United States Court of Appeals for the Fifth Circuit. Among numerous contentions, Paul primarily argued that the district court's ruling was erroneous because: (1) the prior state-court judgment was not a "final judgment on the merits" since (a) the Texas state court lacked subject matter and in personam

jurisdiction over certain purportedly "indispensable parties" (whom Paul had not joined as defendants) thus rendering the judgment improper, and (b) according to Paul, PB-KBB fraudulently obtained the prior state-court judgment; (2) the res judicata bar is inappropriate because PBQD, BMI and the United States were not parties to the state-court action; (3) the FCA claims and the prior state-court action do not constitute the same cause of action; and (4) jurisdiction over FCA suits lies solely in the federal courts and, therefore, he could not have included his FCA claims in his prior state-court action.

On April 28, 1995, the Fifth Circuit affirmed the district court ruling. United States ex rel. Paul v. Parsons, Brinkerhoff, Quade & Douglas, Inc., 53 F.3d 1282 (5th Cir. 1995) (unpublished opinion). In an unpublished opinion, the Fifth Circuit declined to address Paul's collateral challenges to the prior state-court action stated in (1) above, because Paul had failed to raise those issues in the district court and, thus, could not raise them for the first time on appeal. United States ex rel. Paul v. Parsons, Brinkerhoff, Quade & Douglas, Inc., No. 94-20640, slip op. at 3-4 (5th Cir. Apr. 28, 1995). The court of appeals likewise declined to address Paul's argument that because the United States is a party to his FCA suit but was not a party to the prior state-court action, there could be no res judicata because Paul also had not raised this issue before the district court. Id. The court noted, however, that "[e]ven if we were to exercise our discretion to consider this assertion, we would find it frivolous, because the Government declined to intervene in this action." Id.

The Fifth Circuit also rejected Paul's contention that, because PBQD and BMI were not parties to the

prior state-court action, they could not assert the bar of res judicata. Id. at 4. Finally, the Fifth Circuit rejected Paul's contention that the FCA provides for exclusive federal court jurisdiction and, therefore, prohibited Paul from bringing his FCA claims in the prior state-court action. Id. at 5-6.

Even though there are no conflicting court decisions with the instant case, there are no important questions of federal law, and this case involves nothing more than a routine application of settled, Texas state law of res judicata, Paul now seeks the grant of certiorari by this Court, presenting all of the same arguments considered -- and rejected -- by the Fifth Circuit.

## BACKGROUND FACTS

### A. Contract History

From 1965 to the present, BMI has provided research and development services to the U.S. Department of Energy ("DOE") as the contractor operating the Pacific Northwest Laboratories located in Richland, Washington. On April 28, 1978, BMI was assigned responsibility for the management of DOE's National Waste Terminal Storage Program. In particular, BMI was directed to and did establish a new Project Management Division responsible for (1) identification of potential sites with salt formations and/or other geological formations within the United States suitable for development for potential nuclear waste repositories, and (2) the coordination and direction of the development of criteria and specific technologies required for exploration, design, licensing, construction, operations, and monitoring of these repositories.

Effective June 14, 1982, BMI and a joint venture (comprised of PBQD and PB-KBB) known as Parsons Brinckerhoff/P.B.-K.B.B. ("PB/PB-KBB") entered into a subcontract, pursuant to which PB/PB-KBB was to provide architectural and engineering design services relating to the construction of exploratory shafts that would be used to investigate the geological features of potential nuclear waste disposal sites in salt formations (the "Subcontract"). On October 7, 1982, DOE approved the Subcontract.

B. Litigation History

Paul was hired by PB-KBB in May 1981. In June 1982, he was assigned to work on the Exploratory Shaft Facility design, the project encompassed by the Subcontract. Paul alleges that he soon concluded the preliminary design specifications were inconsistent with requirements under federal mine safety standards. Paul claims that he informed his supervisors, orally and in writing, of his concerns. According to Paul, these acts resulted in his transfer to another division at PB-KBB and, ultimately -- twelve days after drafting a memorandum summarizing his concerns -- to his discharge.

In 1983, Paul brought a Title VII action in the United States District Court for the Southern District of Texas against PB-KBB, Civil Action No. H-83-3409, alleging that he was discharged on the basis of his national origin. That action was dismissed without prejudice by stipulation of the parties on June 7, 1984. Paul then filed an action under the Federal Mine Safety and Health Act of 1977 ("Mine Act"), 30 U.S.C. § 801 et seq. (1994), with the Secretary of Labor, wherein he argued that, in violation of § 815(c)(1) of the Mine Act, he was fired because of his safety

complaints. Paul v. P.B.-K.B.B., Inc., 3 MSHC 2006, 2007 (1985). The Secretary of Labor rejected Paul's claim. Id. Paul appealed the Secretary's decision to the Federal Mine Safety and Health Review Commission ("the Commission"). Id. at 2008. The Commission, however, upheld the Secretary's decision. Id. Paul then appealed the Commission's ruling to the United States Court of Appeals for the District of Columbia Circuit, which upheld the Secretary. Paul v. Federal Mine Safety and Health Review Comm'n, 812 F.2d 717, 718 & 720 (D.C. Cir.), cert. denied, 483 U.S. 1023 (1987).

Undeterred, Paul then brought an action in Texas state court, alleging that he was wrongfully discharged for his unwillingness to commit a criminal act. Paul v. P.B.-K.B.B., Inc., 801 S.W.2d 229 (Tex. App. -- Houston [14th Dist.] 1990, writ denied). In that action, Paul contended that "the preliminary study [prepared by PB-KBB] called for one shaft rather than two and that this design 'could've killed people.'" Id. at 229. Paul argued that, as the engineer, he would be called upon to certify the plans and specifications, and doing so would be a violation of § 22.05 of the Texas Penal Code which proscribes "reckless conduct." Id. According to Paul, it was these objections to the project, that resulted in his termination. Id. at 230. After trial, the jury found that Paul was not fired solely because he refused to commit an illegal act. On appeal, the verdict was affirmed. Id. at 230.

Paul attempted to dress up his losing state-court action in new federal clothing by filing the instant action, but the same operative facts underlay both actions. As in the state-court action, where Paul argued that the preliminary shaft design was a violation of applicable safety regulations and "could've

killed people," id. at 229-30, Paul bases his FCA suit upon the same allegations that the design was "extremely dangerous" and "could kill people." See Compl. at ¶ 5. Further, in the state-court action, Paul claimed that he was fired in response to "a written memorandum of objections he leveled at the safety of the project." Paul, 801 S.W.2d at 230. Similarly, in his FCA action, Paul contends that he wrote a memorandum summarizing the "dangerous design problems," and he was fired. See Compl. at ¶ 7. Accordingly, Paul's FCA suit is no more than an attempt to relitigate his prior state-court action.

## SUMMARY OF ARGUMENT

Paul's petition presents two basic issues, neither of which justifies the issuance of the writ of certiorari. The first issue is whether state and federal courts have concurrent jurisdiction over actions brought under the qui tam provisions of the FCA. Every court to consider this issue, including the courts below, have concluded that FCA jurisdiction is concurrent. Furthermore, this Court has repeatedly held that statutes such as the FCA, which provide that actions "may be brought" in the federal courts, do not create exclusive federal court jurisdiction, unless there is either an unmistakable implication from the statute's legislative history that Congress did not want state courts to exercise jurisdiction over the federal action or else a clear incompatibility between state-court jurisdiction and the federal interest advanced by the statute. No such factors are present in this case. This issue, therefore, does not warrant discretionary review by this Court.

Paul's second issue, the application of the doctrine of res judicata to the facts of this case, likewise fails to justify the issuance of the writ of

certiorari. Because the prior judgment was rendered by a Texas state court, Texas law of res judicata controls the outcome of this case. In other words, the lower courts' legal conclusions on res judicata present no federal issues. Furthermore, the lower courts properly applied the facts of this case to the controlling Texas law. The petition for writ of certiorari should be denied.

## ARGUMENT

### I. The Lower Courts Correctly Found That This Action Is Barred By Paul's Failure To Bring His False Claims Act Action With The Prior State-Court Action

#### A. State And Federal Courts Have Concurrent Jurisdiction Over False Claims Act Suits

Paul argues that the lower courts erroneously ruled that the FCA provides for concurrent federal and state court jurisdiction. Pet. 7. Besides presenting a litany of irrelevant constitutional provisions and caselaw quotations, Paul presents no basis for this assertion. Instead, the statutory language of the FCA indicates that there is concurrent federal and state court jurisdiction over FCA suits. In addition, every court to consider this issue has agreed that jurisdiction over FCA actions is concurrent.

In Gulf Offshore Co. v. Mobil Oil Corp., 453 U.S. 473 (1981), this Court set forth the following rule when state courts have jurisdiction in cases addressing federal laws: "state courts may assume subject-matter jurisdiction over a federal cause of action absent provision by Congress to the contrary or disabling

incompatibility between the federal claim and state-court adjudication." Id. at 477-78. In assessing the issue of concurrent/exclusive jurisdiction, the Court noted that a court should "begin[] with the presumption that state courts enjoy concurrent jurisdiction," and this presumption can be rebutted only "by an explicit statutory directive, by unmistakable implication from legislative history, or by a clear incompatibility between state-court jurisdiction and federal interests." Id. at 478; see also Tafflin v. Levitt, 493 U.S. 455, 460-61 (1990); Charles Dowd Box Co. v. Courtney, 368 U.S. 502, 507-08 (1962).

In United States ex rel. Hartigan v. Palumbo Bros., Inc., 797 F. Supp. 624, 631-33 (N.D. Ill. 1992), which was cited by both the district court and the Fifth Circuit in the instant action, the Gulf Offshore-Tafflin factors were specifically applied to the FCA jurisdictional analysis. In Hartigan, the court first reviewed the FCA jurisdictional provision. 31 U.S.C. § 3732 (1994). The court found that the statutory language -- providing that "[a]ny action under section 3730 may be brought in any judicial district . . . ," 31 U.S.C. § 3732 (emphasis added) -- "is plainly permissive." Hartigan, 797 F. Supp. at 631. The court's conclusion is supported by the caselaw. Compare 31 U.S.C. § 3732 (FCA action "may be brought in any judicial district . . . ") with Charles Dowd Box Co., 368 U.S. at 507 (statute providing that action "may" be brought in federal court allows for concurrent jurisdiction between federal and state courts) and Tafflin, 493 U.S. at 471 (Scalia, J. concurring) (provisions providing for exclusive jurisdiction "specifically recite that suit may be brought 'only' in federal court" or that jurisdiction shall be "exclusive").

The court in Hartigan found "no evidence that Congress addressed or even considered the question of concurrent state court jurisdiction over FCA claims [or] that Congress, in its deliberations, affirmatively intended to confer exclusive jurisdiction over such claims on the federal courts." Hartigan, 797 F. Supp. at 632; see also Tafflin, 493 U.S. at 463 ("[L]egislative silence counsels, if not compels, us to enforce the presumption of concurrent jurisdiction.").

The court in Hartigan also assessed whether there was a "clear incompatibility between state-court jurisdiction and federal interests." Hartigan, 797 F. Supp. at 632 (quoting Tafflin, 493 U.S. at 461). Such incompatibility, according to the court, would be influenced by the following factors: "the desirability of uniform interpretation, the expertise of federal judges in federal law, and the assumed greater hospitality of federal courts to peculiar federal claims." Id. (quoting Tafflin, 493 U.S. at 464). The court found all of these factors supported concurrent jurisdiction over FCA suits. Id. First, because FCA claims are civil and not criminal, "there is no overriding need for uniform interpretation." Id.; see also Tafflin, 493 U.S. at 464-65 (finding concurrent jurisdiction over civil RICO actions "creates no significant danger of inconsistent application of federal criminal law"). Second, the court found that FCA suits are premised upon allegations of fraud which "are the type of claims over which state courts presumably have great expertise." Hartigan, 797 F. Supp. at 632; see also Gulf Offshore Co., 453 U.S. at 484 (recognizing that state-court judges have greater expertise in adjudicating personal injury and contract actions). Then, the court rejected the argument that the FCA's "procedural mechanisms" support exclusive federal jurisdiction. Hartigan, 797 F. Supp. at 632; see also Tafflin, 493 U.S. at 466 ("[W]e have previously

found concurrent state court jurisdiction even where federal law provided for special procedural mechanisms similar to those found in RICO."). Finally, the court noted that concurrent jurisdiction over FCA suits advances the policies underlying the statute by encouraging reporting of fraud. Hartigan, 797 F. Supp. at 632. Consequently, the court ruled that jurisdiction under the FCA is concurrent.

Other cases similarly support the finding of concurrent jurisdiction over FCA suits and, additionally, the application of the doctrine of res judicata where the FCA action could have been brought in a prior state-court action. See United States ex rel. Hindo v. University of Health Sciences/The Chicago Medical Sch., 1993 U.S. Dist. LEXIS 17306, at *4 (N.D. Ill. Dec. 7, 1993) (finding "state and federal courts have concurrent jurisdiction over claims brought under the [FCA]," and the plaintiff could have brought the FCA claim with the prior state-court action); see also Robbins on behalf of United States v. Desnick, 1991 U.S. Dist. LEXIS 418 (N.D. Ill. Jan. 10, 1991) ("Because Robbins could have brought both the FCA claim and the state claim for medical malpractice in the same lawsuit, res judicata prevents Robbins from going forward with this action.").

Despite this caselaw, Paul argues that the legislative history of the FCA supports exclusive federal court jurisdiction. Pet. 15-17. In particular, Paul cites the portion of the Senate Report from the 1986 amendments to the FCA which states that "[u]nlike most other types of crimes or abuses, fraud against the Federal Government can be policed by only one body -- the Federal Government. State and local law enforcement are normally without jurisdiction where Federal funds are involved." See False Claims

Amendments Act of 1986, Pub. L. No. 99-562, 1986 U.S.C.C.A.N. (99 Stat.) 5266 at 7. This statement has nothing to do with the issue of court jurisdiction over FCA claims, but relates solely to the law enforcement agencies assigned responsibility for enforcing federal matters, and the fact that such resources are limited, requiring the utilization of the FCA's qui tam provisions to detect fraud. Indeed, this quotation, read in context, arguably indicates that Congress supports concurrent jurisdiction as a further means of supplementing the limited federal resources to detect fraud.

Paul then presents two other quotations of legislative history from the 1986 Amendments -- one relating to a proposal to permit state and local governments to join state law claims with FCA actions brought in federal court and one that would have provided a uniform federal standard for the employment of pre-judgment attachment remedies (rather than following state law standards) under actions brought by the government. Pet. 16. Neither of these proposed amendments, however, were ultimately included in the adopted amendments to the FCA.

Finally, Paul contends that "there is a clear and definite incompatibility of [the FCA's] intent and states' interest in the adjudication of the [FCA]." Pet. 17. Without citation, Paul bases this contention upon the "many state agencies [that] have become defendants in cases arising out of the [FCA]." Id. at 17. Essentially, Paul argues that "[t]he states have [a] conflict-of-interest when adjudicating federal funds." Id. at 17. Yet, even accepting Paul's unsupported assertions that a state court might be hostile to a FCA suit, the federal government still has the option to

intervene in the litigation and refile it in a federal court. Consequently, there is no "unmistakable implication from legislative history" that Congress intended to divest state courts of concurrent jurisdiction over FCA suits, Gulf Offshore Co., 453 U.S. at 478, and there is no matter here justifying this Court's attention.

### B. The Lower Courts' Claim Preclusion Analyses Properly Relied Upon The Law Of The State Of Texas

Paul argues that the district court and the Fifth Circuit "erred in their summary rulings that Texas state laws would govern in deciding the instant case." Pet. 20. Paul, however, presents no pertinent caselaw and ignores the established principle -- mandated by the Full Faith and Credit Clause of the United States Constitution, U.S. Const. art. IV, § 1, and 28 U.S.C. § 1738 (1988) -- that a federal district court "give preclusive effect to state court judgments whenever the courts of the State from which the judgments emerged would do so." Allen v. McCurry, 449 U.S. 90, 96 (1980); see also Hogue v. Royse City, 939 F.2d 1249, 1252 (5th Cir. 1991) ("In determining whether res judicata bars [] federal claims as a matter of law, this Court must give the [Texas] court judgment the same preclusive effect as would be given that judgment under Texas law."). Accordingly, both the district court and the Fifth Circuit properly looked to the law of Texas in assessing the preclusive effect of the prior state-court judgment, and there is no issue for this Court to consider.

### C. The Lower Courts Properly Found That Paul's Instant False Claims Act Suit Constitutes the Same Cause of Action As His Prior State-Court Claim

Paul contends that the district court and Fifth Circuit erred in applying the doctrine of res judicata because "[t]he claims in the instant case were never litigated and could not be done in the Texas state court." Pet. 22. The crux of Paul's argument -- that his FCA allegations were not litigated in the prior action -- is irrelevant under the doctrine of res judicata. Although the doctrine of collateral estoppel requires that "the facts sought to be litigated in the second action were fully and fairly litigated in the prior action," Bonniwell v. Beech Aircraft Corp., 663 S.W.2d 816, 818 (Tex. 1984), the doctrine of res judicata provides a "bar [to] all claims that were or could have been advanced in support of the cause of action." Langston v. Insurance Co. of N. America, 827 F.2d 1044, 1047 (5th Cir. 1987) (emphasis added); see also Abbott Labs. v. Gravis, 470 S.W.2d 639, 642 (Tex. 1971) ("[T]he rule of res judicata in Texas bars litigation of all issues connected with a cause of action or defense which, with the use of diligence, might have been tried in a former action as well as those which were actually tried."). The lower courts' rulings were premised upon the bar of res judicata, not collateral estoppel, and Paul's objection to the application of Texas res judicata principles must therefore be rejected.

Paul also attempts to refute the lower courts' conclusions that Paul's FCA claims constitute the same cause of action as the prior state-court action. Pet. 22-23. Yet, in so doing, Paul presents no law and fails to address the legal reasoning of either the district court

or the Fifth Circuit. Instead, Paul attempts to differentiate the instant case by arguing that the FCA claims occurred through the year 1988, well beyond the date of his 1982 dismissal. Pet. 22. Further, he contends that the facts surrounding the FCA claims occurred in locations other than Houston, Texas, the location from where Paul was dismissed in 1982. Pet. 19-20 & 22-23. Neither of these contentions, however, discredit the lower courts' holdings.

"Under Texas law, an existing final judgment rendered upon the merits, by a court of competent jurisdiction is conclusive of the rights of the parties in all other actions on the points at issue and adjudicated in the first suit." Hogue, 939 F.2d at 1252. The decision in the state court was a final judgment on the merits by a court of competent jurisdiction. See infra Section E. Accordingly, the issue is whether the instant action and the prior state-court action constitute the same cause of action.

"[W]hether two lawsuits constitute 'different causes of action' must be an objective determination. A different cause of action is not merely a different theory of recovery; it should differ in 'the theories of recovery, the operative facts, and the measure of recovery.'" Flores v. Edinburg Consol. Indep. Sch. Dist., 741 F.2d 773, 779 (5th Cir. 1984) (quoting Dobbs v. Navarro, 506 S.W.2d 671, 673 (Tex. App. -- Houston [1st Dist.] 1974, no writ)) (emphasis added in Flores). As the district court below noted, the Texas courts have adopted the "transactional approach" to analyze claim preclusion. See Barr v. Resolution Trust Corp., 837 S.W.2d 627, 631 (Tex. 1992). Under the "transactional approach," "a final judgment on an action extinguishes the right to bring suit on the transaction, or series of transactions, out of which the

action arose." Id. The inquiry requires an evaluation "as to whether the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a trial unit conforms to the parties' expectations or business understanding or usage." Id. (quoting Restatement (Second) of Judgments § 24(2) (1982)).

In this case, Paul's present claim is essentially based upon the same factual background as his state wrongful discharge action. Instead of arguing that he was discharged for unwillingly violating a state statute, Paul now argues that he was subjected to a retaliatory discharge under the FCA. 31 U.S.C. § 3730(h) (1994). The "operative facts" in the instant action are no different from his state action wherein Paul argued that he was fired for "refus[al] to commit an illegal act." Paul, 801 S.W.2d at 229. The central question in both cases is why was Paul discharged. Moreover, despite Paul's attempt to append his discharge claim to a new, additional theory of recovery -- the alleged filing of false or fraudulent claims -- the new theory arises from the same "transaction, or series of transactions" which led to Paul's firing, and Paul clearly could have included that theory in the earlier action. Langston, 827 F.2d at 1047 (noting res judicata "bar[s] all claims that were or could have been advanced in support of the cause of action"). Finally, even if the purported fraud occurred in locations in addition to Houston and through 1988, Paul still could have included these claims with his state-court action, which was tried after 1988. The lower courts, therefore, ruled properly that Paul's FCA action is barred because the claims could have been advanced in a prior action.

### D. The Lower Courts Properly Found That The Present Parties Were Either Parties Or In Privity To Parties To The Prior State-Court Action

Paul challenges the rulings of the district court and the Fifth Circuit, arguing that because BMI, PBQD and the United States were not parties to the prior action, res judicata cannot be applied. Pet. 23. Paul, however, fails to address or even acknowledge the lower courts' analyses and conclusions that BMI and PBQD constitute "privies" of PB-KBB with respect to the state-court action. Further, Paul's argument -- raised for the first time on appeal and labelled "frivolous" by the Fifth Circuit -- that the United States was not a party to the state-court action ignores that he was a party to the prior action, he had his day in court, and he is the party that is barred by the doctrine of res judicata. The res judicata bar prohibits Paul from having a second -- or in this case fourth -- day in court.

#### 1. BMI Is A Privy With PB-KBB With Regard To The Prior State-Court Action

While federal res judicata cases distinguish between concepts of "privity" and "mutuality," see generally 1B Moore's Federal Practice ¶ 412 (1995), Texas law -- which must be applied in this case -- uses the term "privity" to describe both concepts. "Privity connotes those who are in law so connected with a party to the judgment as to have such an identity of interest that the party to the judgment represented the same legal right." United States Fire Ins. Co. v. Millard, 847 S.W.2d 668, 674 (Tex. App. -- Houston [1st Dist.] 1993, n.w.h.) (citation omitted). The Texas

courts also have found privity between parties where one party's liability is derivative of the other's. Lemon v. Spann, 633 S.W.2d 568, 570 (Tex. App. -- Texarkana 1982, writ ref'd n.r.e.) ("[W]here the rights or liabilities of a party are derivative, a judgment binding a party from whom the rights or liabilities are derived may be set up as a bar in a second suit.").

For example, in Soto v. Phillips, 836 S.W.2d 266 (Tex. App. -- San Antonio 1992, writ denied), an employee who lost a workers' compensation action brought a second claim against his employer, the workers' compensation carrier and two physicians who testified at the first state trial. Id. at 267-68. In the new case, the plaintiff alleged a conspiracy, arguing that the physicians were paid-off by the other defendants in exchange for favorable testimony. Id. at 267. The state trial court granted summary judgment for defendants, and the appeals court affirmed, concluding that the plaintiff essentially accused the physicians of "acting in concert with, or being agents of, the carrier and the employer," and, thus, the plaintiff was alleging "vicarious liability." Id. at 269. The court held that "[i]n situations of vicarious liability . . . a judgment for one of the persons in the vicarious relationship bars a later action against the other." Id. (citing Restatement (Second) of Judgments § 51(1)). Consequently, the court held that the action was barred on grounds of res judicata.

In the present case, the lower courts concluded that BMI was in privity with PB-KBB and, thus, was entitled to the preclusive effects of the prior state-court action. These conclusions -- finding privity in a case alleging derivative or vicarious liability -- is an appropriate application of Texas law to the facts. First, PB-KBB was one of the joint venturers to which

BMI subcontracted the design of the exploratory shaft facility. Second, the gravamen of Paul's complaint is that the joint venturers' work under the Subcontract was deficient. Third, Paul has specifically alleged in his complaint that BMI is "vicariously liable" for the actions of its subcontractor. Fourth, Paul contended that BMI and PB-KBB engaged in "collusive activities." Finally, Paul's allegations against BMI and PB-KBB are virtually identical. Accordingly, the lower courts' holdings, that BMI should be given the benefit of whatever res judicata consequences arise from state-court action, is correct.

### 2. The Preclusive Nature Of The Prior State-Court Action Binds Paul Because He Was A Party To That Action

Paul's assertion that there can be no res judicata because the United States was not a party to the prior state-court action is so patently meritless that the Fifth Circuit labelled it "frivolous." The United States declined to intervene in this action, and BMI has never contended that the res judicata bar that impacts Paul likewise prohibits the United States from pursuing any claims it may have against Respondents. Instead, the district court decision is a bar against Paul, who certainly was a party to the prior state-court action. Apparently, Paul would like to characterize his action as one brought by the United States, as if he had no interest in the litigation. Such an interpretation, however, is contrary to the law. See Public Interest Bounty Hunters v. Board of Governors of Fed. Reserve Sys., 548 F. Supp. 157, 161 (N.D. Ga. 1982) (rejecting qui tam plaintiff's argument that "the United States is the true plaintiff" and holding that "the cause of action

brought against defendants . . . 'belongs' not to the United States, but to the qui tam plaintiff').

Any other conclusion -- that is, accepting Paul's position that his qui tam action cannot be barred by the doctrine of res judicata -- would permit a plaintiff to overcome the bar to serial litigation and would be contrary to those cases that have barred FCA cases based upon the doctrine of res judicata. See, e.g., United States ex rel. Hindo v. University of Health Sciences/The Chicago Medical Sch., 1993 U.S. Dist. LEXIS 17306, at *6 (N.D. Ill. Dec. 7, 1993) (dismissing FCA claim on res judicata grounds based on prior state-court judgment); Robbins on behalf of United States v. Desnick, 1991 U.S. Dist. LEXIS 418, at *10-*11 (N.D. Ill. Jan. 10, 1991) (dismissing qui tam suit on res judicata grounds); see also Estate of Menna v. Saint Agnes Medical Ctr., 1994 U.S. Dist. LEXIS 13693, at *32 (E.D. Pa. Sept. 22, 1994) (staying federal FCA suit while state action pending and noting, upon resolution, state action could constitute res judicata). Accordingly, Paul's attempt to overcome the impact of res judicata by arguing that he has no personal stake in the litigation has no merit.

### E. The Fifth Circuit Properly Declined To Address Paul's Attacks On The Validity Of The Prior State-Court Judgment And, In Any Event, Paul's Attacks Are Meritless

Because Paul did not argue in the district court that the judgment in the state court was not a final judgment on the merits, the Fifth Circuit properly declined to address Paul's assertions that the state court lacked jurisdiction over the action and that the state-court judgment was procured by fraud. Paul, No.

94-20640, slip op. at 3-4; see also In re Grand Jury Proceedings, 517 F.2d 666, 675 (5th Cir. 1975) (noting where "argument is raised for the first time on appeal," "the point [is considered] waived" and should not be considered). Where a court of appeals, in its discretion, declines to consider a matter not raised before the district court, the Supreme Court should, absent "exceptional circumstances," not consider the matter. See Jones v. United States, 362 U.S. 257, 272 (1960); Lawn v. United States, 355 U.S. 339, 362-63 n.16 (1958). As shown below, Paul's challenges are patently without merit and, thus, raise no exceptional matters warranting this Court's discretionary consideration of an initial matter on review. See, e.g., Freytag v. Commissioner of Internal Revenue, 111 S. Ct. 2631, 2639 (1991) (exercising discretion to hear matter where "faced with a constitutional challenge that is neither frivolous nor disingenuous").

### 1. Jurisdiction For Paul's State-Court Action Was Properly Vested In The Texas State Court

The prior state-court action was brought by Paul in a court of general jurisdiction in Harris County, Texas. See Tex. Gov't Code Ann. § 24.007 ("Jurisdiction") (Vernon 1988). That action concerned whether, under Texas state law, Paul had been wrongfully terminated from his employment in PB-KBB's Houston, Texas office. Paul, 801 S.W.2d at 229. Paul, as the plaintiff in that case, chose the forum and elected to bring the action in Texas state court. There is no basis upon which Paul can now challenge the state court's subject matter jurisdiction over his state law claim. See generally Restatement (Second) of Judgments § 12 (1982) (noting that parties are precluded from litigating a "court's subject matter

jurisdiction in subsequent litigation [unless] [t]he subject matter jurisdiction of the action is so plainly beyond the court's jurisdiction that its entertaining the action was a manifest abuse of authority"). Consequently, Paul's subject matter jurisdiction attack is without merit.

Paul still argues that somehow the Texas state court lacked in personam jurisdiction over certain "indispensable parties," -- specifically, two "Canadian domiciled employees" who were "assigned [] Paul's work" after Paul's employment was terminated. Pet. 3, 17-19 & 21-22. Although the true nature of Paul's contention is difficult to ascertain, apparently Paul believes that after his employment was terminated by PB-KBB, he was replaced by two Canadians, and the state court did not have in personam jurisdiction over the two Canadians. Despite Paul's assertion that these two individuals are "indispensable parties," Paul never named them as defendants in the state-court action, and Paul participated fully in that action, without raising the issue of joinder of additional parties. Paul cannot now raise this issue. Pirtle v. Gregory, 629 S.W.2d 919, 920 (Tex. 1982) (noting "parties who participate in the trial without complaint will not be heard to complain at the appellate stage" that additional parties should have been joined).

Moreover, even accepting Paul's groundless claim that he was replaced by two Canadians, Paul puts forth no facts to suggest that indispensable parties were lacking in the prior Texas state-court action. Rule 39 of the Texas Rules of Civil Procedure, which parallels Rule 19 of the Federal Rules of Civil Procedure, addresses the joinder of indispensable parties. Tex. R. Civ. P. r. 39 (West 1995); see also Fed. R. Civ. P. 19. Essentially, the purpose of the federal

and state joinder rules is to ensure that the interests of all parties to litigation are protected. See generally Schutten v. Shell Oil Co., 421 F.2d 869, 873 (5th Cir. 1970); Vondy v. Commissioners Court of Uvalde County, 620 S.W.2d 104, 106-07 (Tex. 1981). For example, the right of a defendant not to be subjected to multiple litigation and potential inconsistent obligations are central concerns under these rules. Id.; Schutten, 421 F.2d at 873. Paul has presented no argument that "the Canadians" had any interest in the state-court action such that they should have been joined as parties, and he has not explained how "the Canadians" could have been liable to Paul under the applicable state law in that case. Moreover, Paul presents no evidence that there was any possibility of inconsistent judgments or that Paul's rights could not be fully litigated in the state-court action. Consequently, Paul's argument is devoid of merit.

### 2. The State-Court Judgment Cannot Be Collaterally Attacked On The Basis Of Alleged Fraud

Generally, even if a judgment was obtained by fraud, that judgment is still res judicata in a subsequent action, provided the prior court had jurisdiction to render the judgment. See Vandervoort, Sams, Anderson, Alper & Post, P.A. v. Vandervoort, 529 F.2d 424, 426 (5th Cir. 1976) (noting that a "collateral attack on a judgment" based upon fraud is "irrelevant" once "it [has been] determined that the court had jurisdiction"); see generally 21 Federal Procedure, L. Ed. § 51:188 (1984) ("As a general rule, even a judgment that was obtained by fraud is res judicata so long as the court rendering it had jurisdiction to do so."). As discussed above, jurisdiction

in the prior state-court action was properly vested in the Texas state court.

There is, however, a narrow exception, permitting collateral attack on a prior judgment if the attack is based upon "extrinsic," rather than "intrinsic," fraud. Fidelity Standard Life Ins. Co. v. First Nat'l Bank & Trust Co., 382 F. Supp. 956, 963 (S.D. Ga. 1974), aff'd, 510 F.2d 272 (5th Cir.), cert. denied, 423 U.S. 864 (1975); Raney v. Mack, 504 S.W.2d 527, 533 (Tex. Civ. App. -- Texarkana 1973, no writ). "'[I]ntrinsic fraud' [includes] false testimony, fraudulent instruments, and any fraudulent matter that was presented and considered in rendering a judgment." Raney, 504 S.W.2d at 533. By comparison, "fraud that is extrinsic in its nature, [prevents] one from having a real contest of the suit based on conduct or activities outside of the court proceedings themselves." Fidelity Standard Life Ins. Co., 382 F. Supp. at 963. Such "extrinsic" fraud "must be collateral to the matter tried, and not something which was actually or potentially in issue in the trial." Raney, 504 S.W.2d at 533.

In the instant case, the fraud that Paul claims occurred in the state-court action consists solely of allegations of "intrinsic" fraud. Paul contends that in the state-court proceeding, PB-KBB put forth a "fraudulent" excuse as to why Paul's employment had been terminated. Pet. at 21. Yet, the reason for Paul's termination was the exact issue that was before the court. Paul, 801 S.W.2d at 229. Where the purported fraud "relates to the material issues in the [] case," then the attack on the prior judgment solely involves "intrinsic" fraud and cannot be the basis for a collateral attack. Gilbert v. Franklin County Water Dist., 520 S.W.2d 503, 505-06 (Tex. Civ. App. -- Texarkana 1975,

no writ). Because the alleged fraud relates solely to the issue pending before the court, Paul's attack on the prior state-court judgment is devoid of merit.

## II. Paul's Attacks On The Magistrate Judge's Ruling Raise No Matters Warranting The Grant Of Certiorari

Paul's final arguments, that the United States Magistrate Judge's involvement was improper, fails to raise an issue warranting the grant of certiorari. United States Magistrate Judges are granted authority to rule on specific civil and criminal motions. See 28 U.S.C. § 636 (1988). For example, under § 636(b)(1)(A), a magistrate judge may rule on "[a] non-dispositive pretrial motion such as a discovery motion." Brown v. Wesley's Quaker Maid, Inc., 771 F.2d 952, 954 (6th Cir. 1985) (emphasis in original), cert. denied, 479 U.S. 830 (1986). Under this provision, a district court need not seek the consent of any party to refer the non-dispositive pretrial motion to the magistrate judge. See 28 U.S.C. § 636(b)(1)(B).

Paul contends that it was error for the magistrate judge to deny his motion to compel production of documents because he never consented to her involvement under § 636(c). Pet. 24. The order that Paul challenges, however, was a non-dispositive discovery order for which consent of the parties was not necessary. See 28 U.S.C. § 636(b)(1)(B). The magistrate judge did not try the case and, thus, Paul's reliance upon § 636(c) (which requires the consent of parties) is misplaced.

Nevertheless, Paul also claims that the magistrate judge's denial of his motion to compel was arbitrary and did not comply with requirements of

Federal Rules of Civil Procedure 12(b)(6) and 56. Pet. 24. If Paul is attempting to challenge the appropriateness of the magistrate judge's ruling, he should have done so before the district court. Ayala v. United States, 980 F.2d 1342, 1352 (10th Cir. 1992) (failure to appeal magistrate judge's ruling to district court constitutes a waiver of right to appeal); see also Good v. Allain, 823 F.2d 64, 66 (5th Cir. 1987). As with so many other issues, Paul did not raise this matter before the district court but raised it for the first time on appeal and, thus, cannot raise it now.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

Frederick Robinson
FULBRIGHT & JAWORSKI L.L.P.
801 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
(202) 662-0200

Counsel for Respondent
Battelle Memorial Institute,
Project Management Division